HARVARD LAW REVIEW

VOLUME 109

1995-1996

Copyright © 1995, 1996
THE HARVARD LAW REVIEW ASSOCIATION
CAMBRIDGE, MASS.

HARVARD LAW REVIEW

AARON EDWARD ALT
MICHAEL S. BLUME
MATT BODIE
GARY A. BORNSTEIN
YELLOW LIGHT BREEN
KETANJI O. BROWN
HARRY A. CHERNOFF
TRACY-ELIZABETH CLAY
SUSAN R. CLEARY
DONOVAN J. COCAS
JONATHAN F. COHN
THOMAS B. COLBY
NOELLE M. DALRYMPLE
DENNIS A. DEVINE
MICHAEL R. DIEHL
DENISE JEAN DOSSEN
DAVID L. DUNCAN
TIMOTHY H. EDGAR
STEPHEN W. ENGLE
ALLAN H. ERBSEN
MARK C. FLEMING
ERIKA RENATE FRICK
DAVID S. FRIEDMAN
MANUEL GARCIADIAZ
STEPHEN W. GAUSTER
ELAINE GOLDENBERG
LISA ANNE GROW
ANDREW T. GUZMÁN
RUSSELL P. HANSER
LOUISE E. HAYES
THOMAS S. HIXSON
SUZANNE J. IRVING
KIMBERLY JENEECE JENKINS
NATHAN JUDISH
RAY W. KAHLER
DANIEL LEE KAPLAN
TODD KIM
JEFFREY M. KLEIN
ANITA K. KRUG
CHESTON J. LARSON
DAVID STEPHEN LAW
GIA B. LEE
MICHAEL J. LEOTTA
HALLIE B. LEVIN
DANIEL JACOB LIBENSON
DAVID T. LING
MATTHEW MARK
JENNY S. MARTINEZ
EDWARD R. MCNICHOLAS
GARY E. MURPHY
MARK S. NAGEL
JONATHAN B. NEW
KEVIN CHRISTOPHER NEWSOM
KEITH A. NOREIKA
DAVID G. NOREN
EDWARD S. PALLESEN
DAVID K. PANTON
EDWIN C. PARK
KIMBERLY A. PARKER
MARCY E. PEEK
SCOTT R. PEPPET
DAWN PIEPER
JOHN A.E. POTTOW
AUDREY L. PRICE
ISMAIL J. RAMSEY
LISA P. RECKLER
LAURA A. ROSENBURY
ADAM M. SAMAHA
DANIEL H. SCHLUETER
LAURENCE A. SCHOEN
RICHARD C. SCHRAGGER
PAIGE A. SCOTT
RACHEL E. SELINFREUND
JENNIFER A. SHIELDS
SEAN SHIELDS
SEANA VALENTINE SHIFFRIN
MATTHEW F. STOWE
COLIN S. STRETCH
KARL SUN
DIRK J.J. SURINGA
KINGSLEY L. TAFT
ROBERT H. VISCHER
I-WEI WANG
STEPHANIE R. WANK
DAMON CHRISTIAN WATSON
KANDANCE S. WEEMS
ALYSSA F. WOLPIN
JOHN F. WOOD
IGNATIUS DINO WU

SUSAN SELWAY
Circulation Director

SUSAN J. WALKER
Office Manager

DAVID A. INNISS
Editorial Assistant

DENIS O'BRIEN
Office Assistant

Published eight times during the academic year by Harvard law students.

Citations conform to *A Uniform System of Citation* (15th ed. 1991), published by the Harvard Law Review Association for the *Columbia, Harvard*, and *University of Pennsylvania Law Reviews* and the *Yale Law Journal*.

TABLE OF LEADING ARTICLES AND COMMENTS — AUTHORS

PAGE

APPLBAUM, ARTHUR ISAK. *Professional Detachment: The Executioner of Paris* 458

BLACK, BERNARD AND REINIER KRAAKMAN. *A Self-Enforcing Model of Corporate Law* 1911

BOWMAN, CYNTHIA GRANT AND ELIZABETH MERTZ. *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy* 549

BREWER, SCOTT. *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy* 923

CLERMONT, KEVIN M. AND THEODORE EISENBERG. *Xenophilia in American Courts* ... 1120

DORF, MICHAEL C. *Incidental Burdens on Fundamental Rights* 1175

FRIED, CHARLES. *Foreword: Revolutions?* 13

HANNA, CHERYL. *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions* 1849

HART, JOHN F. *Colonial Land Use Law and Its Significance for Modern Takings Doctrine* 1252

KAPLOW, LOUIS AND STEVEN SHAVELL. *Property Rules Versus Liability Rules: An Economic Analysis* 713

KHANNA, V.S. *Corporate Criminal Liability: What Purpose Does It Serve?* 1477

ROE, MARK J. Chaos and Evolution in Law and Economics 641

RUBIN, EDWARD L. *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions* 1393

STEIKER, CAROL S. AND JORDAN M. STEIKER. *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment* 355

SULLIVAN, KATHLEEN M. *Comment: Dueling Sovereignties* 78

WALDRON, JEREMY. *Kant's Legal Positivism* 1535

TABLE OF LEADING ARTICLES AND COMMENTS — TITLES

PAGE

CHAOS AND EVOLUTION IN LAW AND ECONOMICS. *Mark J. Roe* 641

COLONIAL LAND USE LAW AND ITS SIGNIFICANCE FOR MODERN TAKINGS DOCTRINE. *John F. Hart* 1252

COMMENT: DUELING SOVEREIGNTIES. *Kathleen M. Sullivan* 78

CORPORATE CRIMINAL LIABILITY: WHAT PURPOSE DOES IT SERVE? *V.S. Khanna* 1477

DANGEROUS DIRECTION: LEGAL INTERVENTION IN SEXUAL ABUSE SURVIVOR THERAPY, A. *Cynthia Grant Bowman and Elizabeth Mertz* 549

EXEMPLARY REASONING: SEMANTICS, PRAGMATICS, AND THE RATIONAL FORCE OF LEGAL ARGUMENT BY ANALOGY. *Scott Brewer* 923

FOREWORD: REVOLUTIONS? *Charles Fried* 13

INCIDENTAL BURDENS ON FUNDAMENTAL RIGHTS. *Michael C. Dorf* 1175

KANT'S LEGAL POSITIVISM. *Jeremy Waldron* 1535

NEW LEGAL PROCESS, THE SYNTHESIS OF DISCOURSE, AND THE MICROANALYSIS OF INSTITUTIONS, THE. *Edward L. Rubin* 1393

NO RIGHT TO CHOOSE: MANDATED VICTIM PARTICIPATION IN DOMESTIC VIOLENCE PROSECUTIONS. *Cheryl Hanna* 1849

PROFESSIONAL DETACHMENT: THE EXCECUTIONER OF PARIS. *Arthur Isak Applbaum* .. 458

PROPERTY RULES VERSUS LIABILITY RULES: AN ECONOMIC ANALYSIS. *Louis Kaplow and Steven Shavell* 713

SELF-ENFORCING MODEL OF CORPORATE LAW, A. *Bernard Black and Reinier Kraakman* 1911

SOBER SECOND THOUGHTS: REFLECTIONS ON TWO DECADES OF CONSTITUTIONAL REGULATION OF CAPITAL PUNISHMENT. *Carol S. Streiker and Jordan M. Steiker* 355

XENOPHILIA IN AMERICAN COURTS. *Kevin M. Clermont and Theodore Eisenberg* 1120

TABLE OF NOTES

PAGE

And Justiciability for All?: Future Injury Plaintiffs and the Separation of Powers 1066

Back to the Drawing Board: The Settlement Class Action and the Limits of Rule 23 828

Blown Away? The Bill of Rights After Oklahoma City 2074

"Common Sense" Legislation: The Birth of Neoclassical Tort Reform 1765

Devolving Welfare Programs to the States: A Public Choice Perspective 1984

Due Process Roots of Criminal Collateral Estoppel, The 1729

Evidentiary Framework for Diversity as a Compelling Interest in Higher Education, An 1357

Evidentiary Use of the Ethics Codes in Legal Malpractice: Erasing a Double Standard, The 1102

Executive Revision of Judicial Decisions 2020

Faith to Change: Reconciling the Oath to Uphold with the Power to Amend, The 1747

Fusion Candidacies, Disaggregation, and Freedom of Association 1302

Growing the Carrot: Encouraging Effective Corporate Compliance 1783

In-Kind Class Action Settlements 810

In Sickness and In Health, In Hawaii and Where Else?: Conflict of Laws and Recognition of Same-Sex Marriages 2038

In Vitro Fertilization: Insurance and Consumer Protection 2092

Investor Empowerment Strategies in the Congressional Reform of Securities Class Actions 2056

Limits of Choice: School Choice Reform and State Constitutional Guarantees of Educational Quality, The 2002

Nonmutual Issue Preclusion Against States 792

Out of Bounds: Professional Sports Leagues and Domestic Violence 1048

Prevention Versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders 1711

Principle of Equality in Takings Clause Jurisprudence, The 1030

Reformed Economic Model of Consumer Bankruptcy, A 1338

Right of Owners of Servient Estates to Relocate Easements Unilaterally, The 1693

Taxation of Cable Television: First Amendment Limitations 440

When Should Courts Allow the Settlement of Duty-of-Loyalty Derivative Suits? 1084

Why Law Firms Cannot Afford to Maintain the Mommy Track 1375

TABLE OF BOOKS REVIEWED AND NOTED

	PAGE
ARMOR: FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW	1144
BLAIR: OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY	1150
COLLINS & SKOVER: THE DEATH OF DISCOURSE	1801
FLETCHER: WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS	487
JASANOFF: SCIENCE AT THE BAR	1821
ROBINSON & DARLEY: JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW	518
SHAMIR: MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL	846
SOIFER: LAW AND THE COMPANY WE KEEP	669

TABLE OF BOOK REVIEWS — REVIEWERS

PAGE

ROBERT P. MOSTELLER. *With Justice for Some: Victims' Rights in Criminal Trials* 487

PIERRE SCHLAG. *The Death of Discourse* 1801

TABLE OF RECENT CASES

PAGE

In re Abbott Lab., 51 F.3d 524 (5th Cir. 1995) 858
Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995) (en banc), *cert. denied*, 64 U.S.L.W. 25 (U.S. Jan. 9, 1996) 864
Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) 151
A.I. Trade Fin., Inc. v. Petra Int'l Banking Corp., 62 F.3d 1454 (D.C. Cir. 1995) 1156
Arizona v. Evans, 115 S.Ct. 1185 (1995) 131
Arizona v. Reno, 887 F. Supp. 318 (D.D.C. 1995), *consideration of juris. postponed to hearing on merits*, 64 U.S.L.W. 3410, 3414 (U.S. Dec. 8, 1995) (No. 95-299) 681
Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 2407 (1995) 299
Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995) 171
Carter v. Helmsley Spear, Inc., 71 F.3d 77 (2d Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 2371 (U.S., Feb. 29, 1996) (No. 95-1400) 2110
City of Edmonds v. Oxford House, Inc., 115 S. Ct. 1776 (1995) 309
Commissioner v. Schleier, 115 S. Ct. 2159 (1995) 319
Curtis v. School Committee, 652 N.E.2d 580 (Mass. 1995) 687
EEOC v. Metropolitan Educ. Enters., Inc., 60 F.3d 1225 (7th Cir. 1995) 675
Florida Bar v. Went For It, Inc., 115 S. Ct. 2371 (1995) 190
Freestone v. Cowan, 68 F.3d 1141 (9th Cir. 1995) 1451
Gustafson v. Alloyd Co., 115 S. Ct. 1061 (1995) 329
McIntyre v. Ohio Elections Comm'n, 115 S. Ct. 1511 (1995) 180
Mack v. United States, 66 F.3d 1025 (9th Cir. 1995), *petition for cert. filed*, 64 U.S.L.W. 3642 (U.S. Mar. 15, 1996) (No. 95-1478) 1833
Mastrobuono v. Shearson Lehman Hutton, Inc., 115 S. Ct. 1212 (1995) 269
Metzl v. Leininger, 57 F.3d 618 (7th Cir. 1995) 693
Miller v. Johnson, 115 S. Ct. 2475 (1995) 160
Missouri v. Jenkins, 115 S. Ct. 2038 (1995) 239
New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 115 S. Ct. 1671 (1995) 289
Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 115 S. Ct. 1331 (1995) 121
Pinder v. Johnson, 54 F.3d 1169 (4th Cir. 1995) (en banc) 524
Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995) 229
Prudential Ins. Co. v. Lai, 42 F.3d 1299 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 61 (1995) 1439
In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995) 870
Rosenberger v. Rector & Visitors of the Univ. of Virginia, 115 S. Ct. 2510 (1995) 210
Sandin v. Conner, 115 S. Ct. 2293 (1995) 141
Schlup v. Delo, 115 S. Ct. 851 (1995) 259
State v. Freedom From Religion Found., 898 P.2d 1013 (Colo. 1995) (en banc) 530
United States v. Bryan, 58 F.3d 933 (4th Cir. 1995) 536
United States v. Cusumano, 67 F.3d 1497 (10th Cir. 1995) 1445
United States v. Lopez, 115 S. Ct. 1624 (1995) 111
United States v. Mezzanatto, 115 S. Ct. 797 (1995) 249
United States v. National Treasury Employees Union, 115 S. Ct. 1003 (1995) 200
United States v. Ursery, 59 F.3d 568 (6th Cir. 1995), *cert. granted*, 64 U.S.L.W. 3477 (U.S. Jan. 12, 1996) (no. 95-345) 852
United States v. X-Citement Video, Inc., 115 S. Ct. 464 (1994) 279
Vernonia School District 47J v. Acton, 115 S. Ct. 2386 (1995) 220

Vornado Air Circulation Sys., Inc. v. Duracraft Corp., 58 F.3d 1498 (10th Cir. 1995), *cert. denied*, 116 S. Ct. 753 (1996) 1457
Winstar Corp. v. United States, 64 F.3d 1531 (Fed. Cir. 1995) (en banc), *cert. granted*, 116 S. Ct. 806 (1996). 1162
Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995) (en banc), *cert. granted*, 64 U.S.L.W. 3635 (U.S. Mar. 26, 1996) (No. 95-974) 1827

TABLE OF RECENT LEGISLATION

	PAGE
1995 ARK. ACTS 505, *amended by* 1995 Ark. Acts 1193 (Patient Protection Act)	2122
CAL. CIV. CODE § 51.6 (West Supp. 1996)	1839
17 C.F.R. § 240.15c2-12 (1995) (Municipal Securities Disclosure)	882
1995 Fla. Sess. Law Serv. 2080, 2081 (West), Act of June 15, 1995, ch. 283	876
1995 Fla. Sess. Law Serv. 1311 (West) (Bert J. Harris, Jr., Private Property Rights Protection Act, ch. 181)	542
1995 Ill. Legis. Serv. 224, 229–30 (West) (to be codified at ILL. COMP. STAT. ch. 735, § 5/2-623) (Civil Justice Reform Amendments of 1995, Pub. Act 89-7, sec. 15, § 2-623)	705
1995 Ill. Legis. Serv. 3156 (West) (to be codified at ILL. COMP. STAT. ch. 740, § 57/1-85 (1994)) (Drug Dealer Liability Act, Pub. Act 89-293)	699
1995 Mass. Legis. Serv. 726, 726–28 (West) (Act of Nov. 21, 1995, ch. 218, §§ 1–10)	2116
1995 N.Y. Laws 83, § 266	1168
1995 Ohio Legis. Serv. L-1562 (Baldwin) (to be codified at OHIO REV. CODE ANN. §§ 2305.11, 2307.51–.52, 2919.15–.18 (Baldwin)) (Act of June 28, 1995)	1463
109 Stat. 48 (Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4)	1469